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Supreme Court of the United States

UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM H. SPRAGUE and WILLIAM J. HOWEY,
Defendants-Appellees.

BRIEF IN SUPPORT OF JUDGMENT

HENRY W. JESSUP,
AUSTEN G. FOX,
Amici Curiae.

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BRIEF OF HENRY W. JESSUP AND AUSTEN G. FOX SUBMITTED AS *AMICI CURIAE*.

This brief rests upon the historic and logical basis that the Fifth Article of the Constitution contemplated from the beginning two different kinds of amendment (and, therefore, two modes of ratification)—the one intended to be ratified by legislatures, the other only by the People themselves; also that the Eighteenth Amendment is the first of those propounded since the date of ratification which belongs to the second class, and that the Congress, in sending it out for ratification, inadvertently and as a matter of course, followed what the Court below styled the "traditional method" or uniform precedent in directing the mode of ratification by the Legislatures, **thus defeating its validity as against The People.**

This "traditional method" had been acquiesced in for generations; for the reason, as we view it, that it was appropriate to the previous amendments.

In other words, that the discretion concededly reposed in Congress by Article V is a judicial discretion. It has two modes of ratification to choose from; **but it must select the one appropriate to the nature of the amendment promulgated by it.**

This intent of the Fifth Article appears from the history of the framing of the entire Constitution. During those long debates, one fact stands out. The participants were men who themselves, in outstanding ways and eminent degree, had sacrificed and fought in the War of the Revolution—for what? For personal rights and liberties! For the rights, as Mr. Justice Brown says, *Mattox* v. *U. S.*, 156 U. S. 237, which each "already possessed as a British subject, such as his ancestors had inherited and defended since the days of Magna Charta." And as Mr. Wm. D. Guthrie has put it: "First and foremost among the cardinal principles of Magna Charta was the idea that the individual had *natural rights as against the King.*" They fought for liberty as individuals. If the rights they were asserting had been conceded by the Crown, they would have laid down their arms. As it was, they won independence and went to the Convention in victorious possession of "rights and liberties."

Madison quotes a statement by Jefferson in the Federalist No. 48 that "*an elective despotism was not the government we fought for.*" If the contention of the Government be sustained in this case, then the rights and liberties of the People of the United States are, at any time, in the discretion of the number of men who constitute a given Congress, at the mercy and discretion of an "elective despotism" consisting of a majority of 7,500 state legislators; yet, it has never been demonstrated by law or by history that these legislators have, at any time, had committed to them, as agents or even in trust, the right to consent to the impairment of the personal "rights and liberties" safeguarded by the Constitution or to subordinate any of the residue of personal rights reserved by the People in the Bill of Rights to the control of the Federal Government.

This Court, *Turner* v. *Williams*, 194 U. S. 279, page 296, said: "The powers the people have given to the general government are named in the Constitution and all not there named, either expressly or by implication, are

reserved by the People and can be exercised only by them or *on further grant from them.*" Does the Government, in this case, claim that Article V constitutes a grant absolute and unrestricted to the Congress to propose to the State Legislatures the elimination of any one of the first Ten Amendments? Yet that is the only reasonable conclusion to be drawn from the argument that the Congress has a discretion unlimited, unhampered by the nature of the proposed amendment, and unreviewable in the Courts.

These rights and liberties the men in the Philadelphia Convention were engaged in safeguarding in the preparation of the new Constitution, endeavoring to put "every right and power of the people not delegated or surrendered, * * * *beyond the reach of the Governments*" (II Rives' *Madison*, 38-46)—warned, as they had been, by the futilities and inefficiencies of the Articles of Confederation. As was recently asserted, "the men of 1787-9 had great confidence in The People, but rather a poor opinion of legislators."

So every word of this great document was a battlefield and every phrase a campaign—and the longest campaign of all was as to whether a Bill of Rights should be incorporated therein, for it lasted through and beyond the debates on ratification in the thirteen Colonial or State Conventions (see Jessup, *The Bill of Rights and its Destruction by Alleged Due Process of Law*, Callaghan & Co., 1927, pp. 47 *et seq.*).

We respectfully ask the Court, in considering the point raised in this brief, to seek to recapture the spirit of the pioneers of our Government and instead of looking backward merely upon decisions of this and other courts, to look forward to what the framers of the Constitution contemplated both in their desire to form a stable government and in their fears of what this new super-government might do, and, in that connection, to recall that the Constitution was based upon the Declaration of Independence and that the Preamble was ever present in the minds of

those who took part in the debates in the First Constitutional Convention.

Hence it is respectfully submitted that when the framers of the Constitution focussed their work on *future amendment* of the document, they confronted dual governmental functions in the chart which was to guide the new super-government—for the new United States was to operate downward *in two directions:*

> (1) Some of the personal rights just wrested sword in hand from the control of the Crown had to be *re-subordinated to the control* of the new Federal Government;
>
> (2) So, also, some of the governmental powers possessed by the Colonies or States as successors of the Crown had *to be surrendered by them* to and be bestowed upon the new Federal Government, so that it could function nationally and internationally.

Accordingly, in the first Constitutional Convention when the need to incorporate in the Constitution a bill of rights was urged, the answer was: "This is to be a government of delegated powers only. What is not given will not be possessed." This led to a tie vote (Meigs, *Growth of the Constitution*, 314; V Elliott, *Debates*, 538), and ultimately to the "gentleman's agreement" or "tacit understanding," as Taylor calls it, fulfilled by the first Congress on the motion of James Madison (see Jessup, *Bill of Rights, etc., supra*, pp. 47 *et seq.*).

The result was partial and in some cases conditional ratification (see Jessup, *Bill of Rights, etc., supra*, pp. 28-29; also text of ratifications, *Formation of the Union*, House Document No. 398, 1927, pp. 1009 *et seq.*, showing that seven States ratified with reservations as to Bill of Rights, and Massachusetts in effect *conditionally*, p. 1018), and the first ten amendments were framed and adopted on motion of Mr. Madison, in the first Congress, as such

a Bill of Rights, to allay the fears and suspicions of those who thought they might have leaped from the frying pan of King George into the fire of a Frankenstein monster of experimental government (see Jessup, *Bill of Rights, etc., supra*, p. 47). See also resolution of First Congress submitting first twelve amendments to the Constitution (II *Documentary History Constitution* [1894], 221 *et seq.*), which begins:

> "The Conventions of a number of the States having, at the time of their adopting the Constitution, expressed a desire, in order to *prevent misconstruction* or *abuse* of its powers, that *further declaratory and restrictive* clauses should be added, * * *."

These amendments, being declaratory *and* restrictive of the powers of government, were, under Article V, proposed for ratification "to the legislatures of the several States" (*id.*). The first and second amendments then proposed failed of ratification.

The conclusion is then that Article V contemplated by its express language:

> **A. That if an amendment were to be proposed, giving to the Federal Government any more governmental powers, they would have to be subtracted from the residuum of such powers not originally delegated by the States or Colonies, and hence must be ratified by a given vote of the Legislatures of the States, as custodians or possessors of such residuum of governmental powers.**
>
> **B. But and if it were proposed by a new amendment to subject individual rights (not originally subordinated to Federal control) to the regulation or control of the new Federal Government, then the consent of the People, who had never theretofore relinquished those rights, must be secured, in the alternate manner prescribed by Article V.**

We assert that this differentiation of mode of ratification was deliberate—for every word of the great document was deliberate.

The Supreme Court has held that in construing the Constitution, effect must be given to every clause. No construction can be adopted which treats any provision of the instrument as mere surplusage. The framers had a purpose and an end in view in adopting each clause; and that construction must be adopted which gives effect to each clause.

On this subject of constitutional construction, Chief Justice Marshall said:

> "It cannot be presumed that any clause in the Constitution is intended to be without effect, and a construction which would lead to such a result is inadmissible, unless the words require it."
>
> *Marbury* v. *Madison*, 1 Cranch (U. S.) 137, 174; 2 L. Ed. 60, 72.

Why did the framers, more intent on limiting the new Congress than on empowering it, formulate and insert this differentiation if not to cover the alternate kinds of amendment that might in the uncertain future be put forward.

The Tenth Amendment did not create this differentiation. It merely copper-fastened it by the safeguard of explicit reservation. The words "to the States *or* to the People" meant the same as the differentiation in Article V as to how the new power or control was to be achieved by the Federal Government. It was the reassurance *demanded* in the "reservations" of seven ratifying conventions, *promised* by the "gentleman's agreement," *confirmed* by Mr. Madison in his opening speech in the first Congress, and constantly *kept in mind* during the debates on the text of the Bill of Rights, *i.e.*, the first ten amendments.

Is it likely that the men of 1787, distrustful of "legislators," should have intended to leave the rights "reserved

to the People," which they themselves had won and were then engaged in safeguarding, to the tender mercies of "the governments," *i.e.*, of any given Congress and of a majority of our 7500 State legislators?

We submit this brief, lest the [redacted]stress laid in the argument below upon the Tenth Amendment should obscure the constitutional issue otherwise so explicitly presented to this Court.

It will readily be seen that if this contention as to the discretion of the Congress be true, the amendments other than the Eighteenth Amendment were properly submitted to the Legislatures, because they fall under the first class A, *supra*. Even the Fourteenth Amendment, which seems to deal with "rights" of the people of the United States, was not of the second class B, for it was in substance and effect a further safeguard to those rights against what Rives calls "the governments," in that it protected every citizen of the United States against arbitrary encroachment in Federal or State courts upon his rights, and, therefore, it was proper to submit it to the Legislatures and not to "the People."

But the Eighteenth Amendment patently assumes to subtract from rights reserved to "the People." However selfish, however petty any such right, it is sacred and safeguarded by the Tenth Amendment though it fall in the *de minimis* class. It would be lamentable if it were to be supposed that the Tenth Amendment was intended to prevent ratification of *any* future amendment by the Legislatures. It left Article V unchanged with its dichotomy of *purpose* and of *mode of ratification*.

In *Federalist* 85, Alexander Hamilton says:

> "For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful will be *applicable to the organization of the government, not to the mass of its powers.*"

Here a distinction is drawn between an amendment dealing only with the organization of the Federal Government and one adding to the mass of its powers. Evidently is was a realization of differences in the nature of proposed amendments that caused the framers to provide the two modes of ratification.

James Madison, in *Federalist* No. 48, third paragraph, said:

> "As the people are the only legitimate fountain of power, and it is from them that the Constitutional Charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to *recur to the same original authority* * * * *whenever it may be necessary to enlarge, diminish, or new-model the powers of the government.*"

Any other construction would be to assume that our forefathers, instead of seeking to carry out the purposes declared in the Declaration of Independence and in the Preamble to the Constitution, were actually conferring upon what Rives calls "the governments" the very powers that they had successfully denied to Parliament and King combined.

We submit, additionally, that nowhere in our State Constitutions nor in our political history is there evidence that the People of the United States (*which is an aggregate greater than the mere combined citizens of the States*) ever delegated to any or all State Legislatures the power to subordinate to Federal control any of thesrights reserved to "the People" by the United States Constitution.

In Cooley on *Constitutional Limitations* (7th Ed., 1903, at p. 61), the author writes:

> "It is obviously impossible for the whole people to meet, prepare and discuss the proposed alterations, and there seems to be no feasable mode by which an expression of *their* will can be obtained, except by asking it upon the single point of assent, or disapproval. But no body of representatives,

> unless specially clothed with power *for that purpose by the people* when choosing them, can rightfully take definitive action upon amendments, or revisions; they must submit the result of their deliberations to the people—who, alone, are competent to exercise the powers of sovereignty in framing the fundamental law for ratification or rejection."

This doctrine received the approval of this Court in 1907.

> "The powers the people have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised by them, or upon further grant from them."
>
> *Turner* v. *Williams*, 194 U. S. 279, per Mr. Justice Brewer.

Once again, follow Hamilton, in the New York Convention, this time with reference to the unfitness of State Legislatures of the day to be trusted with the power to insert into the Constitution, or, equally, to remove therefrom any of its parts. "Look at their history." "What frictions have arisen from the most trifling causes? What intrigues have been practised for the most illiberal purposes? Is not the State of Rhode Island, at this moment, struggling under difficulties and distresses, for having been led blindly by the spirit of the multitude? What is her legislature, but the picture of a *mob* (in original) * * * Let us beware that we *do not make the state legislatures a vehicle in which the evil humors may be conveyed into the national system!*" (2 Ell. *Deb.* 317).

On Tuesday, February 5, 1788, the *Federalist* No. 49 contained the following:

> "As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems

> strictly consonant to the republican theory to recur to the same original authority"—a direct reference to the "conventions" of the Seventh and Fifth Articles—"whenever it may be necessary to enlarge, diminish, or new-model the powers of government."

The discretion of Congress in selecting the mode of ratification is thus reviewable in this Court. Nor is this Court foreclosed by its previous decisions in so-called Prohibition cases, from re-examination of the validity of the Eighteenth Amendment.

It is commonly reported that on the argument of the "Prohibition Cases," a question was put from the Bench while the counsel for Rhode Island was arguing: "Was there no method then by which an amendment such as the XVIIIth could have been validly adopted?"—to which counsel is said to have replied, "No"; and in the decision of the Circuit Court of Appeals for the Second Circuit, in the case of *United States of America, Appellee*, v. *Louis E. Thibault, Appellant*, the Court, in its opinion, assumes that the question presented by this brief was, previously in the National Prohibition Cases, raised in this Court in the brief of the Hon. Elihu Root in his argument that "if the power of amendment vested in Congress and thirty-six of the State Legislatures be absolute and unrestricted, then there would be no limitation whatever upon their legislative authority."

It is respectfully submitted that the question presented and argued by Mr. Root did not explicitly raise this question of the double nature of the Fifth Article of the Constitution or the question that the discretion of Congress was a judicial discretion and that while it could select the mode of ratification, it was bound to select, according to the intent or tenor of Article V, the mode appropriate to the nature of the amendment propounded for ratification. For, if an amendment be *properly* proposed to be ratified by the Legislatures, then their power would be "absolute and unrestricted." If not *properly* so proposed, then the

ratification is futile. What other sense or purpose can otherwise be read into or inferred from Article V? (see Jessup, *Bill of Rights*, *supra*, p. 69).

The assertion by Mr. Rives in his "Life and Times of Madison," quoted above, finds its justification in the reports of the Thirteen Conventions called to consider the ratification of the Constitution, even more than in the debates at the Philadelphia Convention itself. We refer to the statement that it was the determination of the Founders to put the rights or liberties that they had won "beyond the reach of the governments," which means not only the new United States Government but the Governments of the respective colonies or states. The New Government was intended to be a national government, in contrast to the confederation which was a Federal Government. This was pointed out in the Virginia Convention by Mr. Madison, who contrasted the existing system, which, he said, "has been derived from the dependent derivative authority of legislatures of the states, whereas this (meaning the proposed new national government) is derived from the superior power of the people"; and, he added: "if we look at the manner in which alterations are to be made, the same idea is, in some degree, attended to" (3 Ell. Deb. 94).

In the North Carolina Convention, Maclaine spoke as follows: "It may be justly said that it (meaning the Constitution) diminishes the power of the State Legislatures." Does not this exclude the possibility that he supposed that the Constitution clothed a combination of three-quarters of the State Legislatures with an omnipotent power of writing in *or writing out* of the Constitution, including the Bill of Rights, rights for which the People of the United States had fought the British King and Parliament?

In another place, Madison said: "If the 'conventions' ratify the Constitution, it will be a government established not through the intervention of the legislatures but by the people at large."

In the Pennsylvania Convention, James Wilson spoke to the same effect (2 Ell. Deb. 443).

We make no apology for this appeal to this Court to take judicial notice of the facts of history. A great Judge of the New York Court of Appeals said, years ago: "We appeal to history and not to logic for the explanation."

We venture to paraphrase the trenchant words of another Judge, Cardozo, Ch. J., in *Smith* v. *Loughman*, 245 N. Y. 497: **"If this statute be upheld, there is set in it (our Constitution) an entering wedge that may be the beginning of its destruction."**

Respectfully submitted,

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NOTES.

A. Conventions.

The brief for the United States, at page 17, quotes Gerry in the First Congress. It omits to add that he had strenuously opposed that clause in Article V adopted in the Philadelphia Convention, whose nearly last act was to vote down, 10 to 1, his motion to strike out from Article V the words "or by conventions in three-fourths thereof" (Hennessy, *Citizen or Subject*, p. 134).

Why not have quoted what Wilson said?—"Upon what principle is it contended that the sovereign power resides in the State governments? * * * The proposed system starts out with a declaration that its existence depends upon the supreme authority of the people alone" (2 Ell. Deb. 443). Or what Daniel Webster said in 1830, in his reply to Haynes?—"If any construction be established * * * so as to become practically a part of the Constitution, they (the people) will amend it at their own sovereign pleasure. But while the people choose to maintain it as it is, while they are satisfied with it and refuse to change it, *who has given to the State legislatures* a right to alter it either by interference, construction or *otherwise?*" (Italics ours.) And he continued: "The people have not trusted their safety, in regard to the general construction, to their hands. They have required other security and taken other bonds."

B. Rights and Liberties.

In his book, *Citizen or Subject* (Dutton & Co., 1923), Mr. Francis X. Hennessy, the author, has collated, from the *Federalist*, from Elliott's *Debates*, and from the decisions of this Court, the contemporary declarations and arguments used by the men whose "*primary object in framing this Constitution was to preserve the rights for which they had fought and in fighting for which they had achieved independence.*"

We call special attention to the "Eleventh" chapter, in which he pointed out that "whatever the Fifth Article meant to those who made it, it means to-day (see *Scott* v. *Sandford*, 19 How. 393, page 426). Referring to the Constitution, this Court said: '*It speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States.*'"

In 3 Elliott's *Debates*, 446, Patrick Henry's argument before the Virginia Convention is quoted from, in which he pointed out "that one-twentieth part of the American people, a trifling minority, may reject the most salutary amendments, *if* the powers contemplated could be exercised effectually, not by the people of the United States, *but by State legislatures.*"

The argument in this chapter of Mr. Hennessy's book is an attack upon the theory upon which the Government seems to rest in these "Prohibition Cases," that the Fifth Article of the Constitution constituted a *grant* of power to what Rives calls "the governments," whether State or Federal.

Madison, the drafter of the Fifth Article, explicitly declared that if the sovereignty of the States could not be reconciled to the happiness of the people, "let the former be sacrificed to the latter" (*Federalist* No. 45).

C. Bill of Rights.

We have called the first ten amendments a "Bill of Rights." The documents sent to the First Congress, by way of ratifications, in effect so defined the accompanying reservations. See *Formation of the Union*, *supra*; Massachusetts, p. 1018; South Carolina, p. 1023; New Hampshire, p. 1025; Virginia (expressly), p. 1028; New York, p. 1035; North Carolina (expressly), p. 1044; Rhode Island (expressly), p. 1052. And see Abraham Lincoln's letter to Alexander H. Stephens, January 19, 1860: "The first ten amendments are the Bill of Rights."

D. Right Thing in the Wrong Way.

A situation similar to that of to-day existed at the time of Abraham Lincoln's inaugural, the "moral" sense of the people being, however, otherwise aligned. He said: "The fugitive-slave clause of the Constitution, and the law for the suppression of the foreign slave trade, are each as well enforced, perhaps, *as any law can ever be* in a community where the moral sense of the people *imperfectly supports the law itself.*"